Titford Property Co. Ltd. v. Cannon Street Acceptance Ltd. [1975] Creswell Encyclopaedia of Banking Law p. 71 and *Enshun Properties Sdn. Bhd. & Ors v. MBF Finance Bhd.* [1992] 2 MLJ 137. Here again I accept the argument of Counsel for the defendant. The alleged terms of the oral collateral agreement (summarised above) which the plaintiff sought to prove are inconsistent with the terms of the said letter and with the terms of the charge. The end result of the alleged oral collateral agreement is that the loan is not repayable upon demand which is inconsistent with the provisions of the said letter and the charge that the loan be repayable on demand. That being the case, the plaintiff cannot avail itself of the proviso (b) of s. 92 of the Evidence Act, 1950, and therefore cannot introduce oral evidence to prove the alleged oral collateral agreement. I do not think *Voo Min En Case* is of help to the defendant because that case concerns an alleged oral agreement which the law requires to be in writing and to be registered which is not the issue here. *Titford Property Co. Ltd. Case* is also of no assistance because the case concerns contradictory written terms in an agreement which is also not the issue here. Similarly *Enshun Properties Sdn. Bhd. Case* is also of no relevance because the issue there was whether a bank could recall a 3 year term loan on demand before the term expires which, again, is not the issue.

Therefore, there is no serious issue to be tried. Given my decision, I dismiss the plaintiff's application with costs to be taxed. Since this conclusion of mine would effectively dispose of the plaintiff's application, I need not consider issue 2 and issue 3 though I would have like to deal with them to do justice to the arguments advanced by Counsel, but time does not permit as the exigency of this matter requires a decision before the 20 May 1993 (after I had heard argument on the 15 May 1993) and because I am in the midst of a drug trafficking trial which was temporarily halted to deal with the application herein.

IN RE SIM AND CHIA

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[DIVORCE PETITION NO. (33) - 29 OF 1992]
28 MAY 1993

FAMILY LAW: Duties of Court when dealing with matrimonial matters - Court requiring affidavit of means of the parties to be filed - Court also requiring filing of certificate of health of children - Reasons for requirement of additional documents.

The Court required the filing in of additional documents not provided for in the Law Reform (Marriage & Divorce) Act 1976. The learned Judicial Commissioner gave his reasons for the requirement to file in additional documents.

Held:

[1] The Court must never simply order what the parties petition for without first assuring itself that the terms are just, always warning itself that it may happen that one party may have been forced to accept whatever the other party dictates because the party desperately wants a divorce at whatever cost.

[2] The welfare of the child of the marriage is of paramount importance and the affidavit of means was necessary to see how much the parents, both the one who has custody and the one who has not, should contribute in terms of financial provisions for the children of the marriage.

[3] The medical certificate regarding the health of the child was important for if the child was suffering from illness requiring special medical treatment, then special provisions should be made.

[Orders accordingly].

Cases referred to:
Sivanesan v. Shymala [1986] 1 MLJ 400 ***(refd)***
In re Divorce [1984] MLJ 158 at p. 160 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 83, 94, 96

For the petitioners - Sim Paw Fatt; M/s. Chong & Pang

JUDGMENT

Ian H.C. Chin JC:

This judgment is prompted by the fact that comments had been passed in Court that other High Courts do not require what this Court requires in proceedings relating to matrimonial matters. I thought it best to give my reasons for doing what I have done in this case, as well as others which came before me. The best course, I think, is to first make reference to the law. Of relevance is of course the Law Reform (Marriage and Divorce) Act, 1976 ("the Act"). But I will first cite the various passages of the judgment of the learned Lee Hun Hoe CJ (Borneo) in the case *Sivanesan v. Shymala* [1986] 1 MLJ 400:

> Paragraph (e) is one of the recommendations of the Royal Commission and reads as follows:
>
> (e) that before making a decree the Court shall take into consideration the interests of the child or children of the marriage and of either party likely to be adversely affected thereby and that upon granting a decree, the Court do so upon such terms and subject to such conditions as it seems fit and just to both parties. [p. 402.]
>
> ... the petitioners must appear in court for the Court may wish to satisfy itself by questioning them as to whether they freely consent to the dissolution of the marriage and whether the provision for the wife and for the support, care and custody of the children, if any, are fair and reasonable. It may, after questioning, even attach other conditions if it thinks fit. [p. 402]
>
> There was nothing to prevent the learned Judge from attaching other terms or conditions to the decree if he deemed fit. But usually before he did so he would explain to the spouses and obtain their consent. [p. 404]

These are a brief but succinct re-statement of the duties of the Court when dealing with matrimonial matters. More detailed provisions, to which the Court must have regard, are to be found in the Act and these concern the division of matrimonial assets, the maintenance of the spouse, the custody and maintenance of the children. The Court must never simply order what the parties petition for without first assuring itself that the terms are just; always warning itself that it may happen that one party may have been forced to accept whatever the other party dictates because the party desperately wants a divorce and at whatever cost.

Therefore, apart from whatever documents the Act requires to be filed in relation to a petition for divorce, this Court also requires an affidavit as to the means of the parties setting out their income and assets and a certificate from a doctor certifying to the state of health of the child or children. In fact, I am just continuing this salutary practice which had been insisted on by the learned John Chong Yik Liong J. The reasons for these requirements will be apparent when provisions for the maintenance of the wife and children are considered. After satisfying myself that the parties freely consent to a divorce, in the case of a joint petition, and that there is no legal impediment, I then adjourn the hearing to chambers in order to consider the ancillary provisions before I pronounce any decree nisi.

In chambers, the parties would be encouraged to speak and the Court would emphasise to them that though the parties may be going their separate ways, the child or children are still their flesh and blood and they have been brought into this world without their consent and not knowing what the Court proceedings are all about, what the Court tries to do is to make it less traumatic for the children. When considering visitation right, there should not be any prohibition against any spouse from visiting the children unless there is evidence to show the spouse is a danger to the children. Talking to the children, if they are of the age when they can converse, can usually establish whether they like being with a particular spouse. Inspection of the children can also tell whether there was any physical abuse. Whatever the quarrels between the parties, the children should not suffer too much as a result and they should not be used as weapons or tools in the fights of their parents. It is possible to lessen the childrens sense of loss if the party not given custody is allowed to visit and take the children out as often as possible. That is why there must not be any provision that prohibits one party from visiting the children. In fact, the Court should encourage as many a visit as possible so that the children can feel that they still have their father

and mother. Without exception, my experience has shown that when the parties are told the reason why the children should maintain constant contact with their parents who are about to go their separate ways, the parties gladly relented and willingly agreed to vary the visitation right given to the party so that the children can see the spouse not given custody as often as possible. The children, with frequent visits from the parent without custody would definitely be happier than when they only see the parent not given custody, say, once in a month.

Once the parents are convinced that the welfare of the children is important, then agreeing to financial provisions for the children come very willingly. With our experience in life, we should be able to establish how much a child needs to pay for necessities. The Court goes through the arithmetics with the parents and more often than not, the financial provisions for the children which the parents originally agreed are varied upwards, and very willingly at that. Apart from necessities, both parties are encouraged if their financial positions permit, to contribute either monthly or yearly to saving accounts or endowment policies or education policies for the children. If the children are suffering from illness requiring special medical treatment, then special provisions should be made. This is why the medical certificate regarding the health of the children is important. How much the parents, both the one who has custody and the one who has not, should contribute, would depend on their means which the Court can only gather from the affidavit of means of the parents. That is not all that the Court should consider. The Court should also consider security for the children under s. 94 of the Act. Having done that much, which I have just described, as the Court could under the circumstances, the Court would next proceed to consider the position of the wife.

If no provision had been made for maintenance of the wife and the petition says the parties have agreed, the Court should investigate the reason for not making a provision for the wife to ensure that the wife had not been forced into agreeing to no provision for herself.

Before the Court adjourns to open Court, the parents are reminded that the various provisions to be ordered are based on what they say they earn in their affidavits. If their circumstances should improve, the children and the wife can come to the Court to have the provisions revised upwards under s. 96 and s. 83 of the Act.

After having considered all the matters in chambers that I have just set out and after the parents have consented to the orders to be made in consequence thereto, the Court would then adjourn to open Court to pronounce its orders.

In the present case, the orders made were, after omitting the names of the parties, as follows:

> The marriage solemnised on 4 May 1984 between [S] and [C] be dissolved unless sufficient cause be shown to the court within 3 months from the making of this decree why such decree should not be made absolute. [S] shall have the care and custody of the two children of the marriage, namely [A] and [B]. [S] shall: (1) continue to pay premiums of the policy 8920285838 until its maturity which policy has taken out for the benefit of [A]; and (2) continue to pay premiums of the policy no. S910118391 until its maturity, which policy was taken out for the benefit of [B]. [C] shall commencing in the month of June 1993: (1) pay into the bank account of [A] a monthly sum of RM100 until the said [A] shall have reached the age of 18 or until further order of the court, whichever is earlier; and (2) pay into the bank account of [B] a monthly sum of RM100 until the said [B] shall have reached the age of 18 or until further order of the court, whichever is earlier. The said [C] shall be entitled to visit and take the children out one day in a week. The said [S] shall maintain the said children. That there be liberty to apply.

It is my fervent wish that lawyers should go into the details of the matters I have herein referred to when they prepare the petition for divorce. I hope I have explained the reasons why this Court sets down so many requirements with regards to divorce petitions, notwithstanding joint petitions, when parties seemingly have agreed and resolved everything before they go to Court, and why it takes hours to settle one joint petition for divorce.

This court will not be, to use the words of Shankar J. *In re Divorce* [1984] MLJ 158, at p. 160, "a mere rubber stamp" for petitions for divorce.

MEWATI SDN. BHD.

v.

TOP EXCLUSIVE SDN. BHD. & 6 ORS.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[ORIGINATING SUMMONS NO. T(24) - 28 OF 1992]
7 JUNE 1993

PRACTICE & PROCEDURE: Plaintiff making application for declarations - Whether there is in fact a dispute - Whether declarations sought necessary - Whether application should be granted.

The plaintiff together with the second, third and fourth defendants successfully applied for extraction of timber from State land. The district surveyor had in his plan demarcated the separate areas that had been alloted for the parties but the area allocated for the plaintiff could not be surveyed as the approval of the Director of Lands & Surveys had not been obtained for the issue of the RSP to the plaintiff.

The plaintiff sought a declaration that the second, third, and fourth defendants should only survey their respective areas within the said timberland in accordance with the demarcated sketch map prepared by the district surveyor and that upon issuance of the RSP, the plaintiff be at liberty to survey the said land as demarcated in the sketch map prepared and drawn up by the district surveyor.

Held:

[1] There was no allegation and no evidence that the first, second, third and fourth defendants were going to be caused to be surveyed more areas than approved to them or that they would include in their survey areas that had been approved to the plaintiff. It was a non-issue and there was no dispute before the Court which necessitated a declaration.

[2] The plaintiffs in their rush to stake their claim to the land were knocked out technically because they did not procure the RSP. They did not obtain the RSP because they approached the Director of Forests instead of the Director of Lands & Surveys. This sequel belied the intention behind the plaintiff's application which was absolutely devoid of merit.